# In the High Court of Judicature for Rajasthan
# Jaipur Bench

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Cr. Misc. Petition No.935/2000
N.H.Khushrokhan & P.V. Nayak
***Versus*** State

**Date of Order ::: 18/09/07**

***Hon'ble Mr. Justice Ajay Rastogi***

Mr. VP Bishnoi for Mr. S.R.Bajwa, for petitioners
Mr. Arun Sharma, Public Prosecutor for State.

Instant Misc. Petition U/s 482 CrPC is directed against taking cognizance of offence U/Ss 18(1)(i) & 18(a)(vi) of Drugs & Cosmetics Act, 1940 ("**the Act**") vide order dt.28/05/99 and summoning petitioners in Cr.Case No.102/99 vide order dt.15/07/99 of Chief Judl. Mag. Bundi.

Petitioner Nos.1 & 2 (accused No.3 & 4 in complaint) are Managing Director and Director, Burroughs Wellcome (India) Ltd. ("**Company**") which is incorporated under Companies Act and engaged in manufacturing of drugs and medicines.

On 30/09/1997, Drugs Inspector visited M/s Janta Medical Hall, Bundi of which Smt. Razia Bai is Proprietor and took sample of "Calpol paediatrics suspension syrup" bearing Batch No.K-112 with manufacturing date June, 1997 and expiry date May, 1999. Sample was sent for analysis to

State Public Analyst, Jaipur who vide report dt.28/02/98 opined that sample taken on 30/09/97 does not conform to the claim with respect to “4-amino-phenol” - a copy whereof alongwith show cause notice was sent by Drugs Inspector to M/s Nainani Medico who forwarded it to petitioners – in response whereof, petitioners sent letter dt. 30/11/98 controverting report of Public Analyst.

It is pertinent to mention that the petitioners' Co., had got the sample analysed at Kemwell Ltd Bangalore, where produced was being manufactured under license and after analysis of sample by a Government approved Public Testing Laboratory in Bangalore, its report was positive and proves that sample does conform to the pharmacopoeia requirement with respect to “4-amino-phenol”.

It has come on record that after Public analyst report dt.23/02/98 being controverted by petitioners, Drugs Inspector moved an application on 01/04/99 to the learned Magistrate seeking direction for re-analysis of sample by Central Drugs Laboratory but on 05/04/99, the application was rejected on the premise that no complaint has been filed; hence direction can not be issued. Ultimately, on 28/05/99, Drugs Inspector filed

complaint for prosecution against petitioners as well as other accused for offence U/Ss 18(a)(i) & 18(a)(vi) of the Act and also making prayer therein to send sample for re-analysis by Central Laboratory. Be that as it may, referee sample was belatedly sent to analysis by Central Drugs Laboratory, which in its letter dt.04/06/99 endorsed remarks ad infra :

> "No opinion could be given regarding the standard of the sample under Drugs & Cosmetics Acts & Rules as the sample was received on the last date of date of expiry (31/05/99) and could not be tested before the said expiry date."

However, the complaint was registered and learned Magistrate took cognizance of offences (supra) and issued process against petitioners and other accused vide order dt. 15/07/99. Hence this petition.

Counsel for petitioner submits that there is no allegation in entire complaint against petitioners as to how and in what manner they were in-charge of and responsible for conduct of business of the Company, which requires necessary ingredient as contemplated in S.34 of the Act in order to launch prosecution

against the Company for holding it guilty of offences; which are completely lacking in instant case and a vague reference of responsibility is not sufficient compliance of mandatory requirement U/s 34 of the Act. In support, Counsel placed reliance upon decision of Apex Court in **Municipal Corpn Delhi Vs. Ram K.Rohtagi (AIR 1983 SC 67); State of Haryana Vs. Brijlal Mittal (AIR 1998 SC 2327)** and of this Court **in Bharat Insecticides Ltd Vs. State of Rajasthan (1996 (1)RLR 349) and M/s Cadila Health Care Ltd Vs. State (DB) (2007(1) RLR 389).**

Counsel further submits that once State Public Analyst report was disputed by petitioners sample was required to be sent for re-analysis through Central Laboratory – as per its report dt.04/06/99, sample could not have been re-tested on the premise that it was received at the fag end of expiry date of sample; and in absence of report of Central Drugs Laboratory, State Public Analyst report could not be considered to be conclusive proof, right of accused provided U/s 25(4) of the Act has been infringed and once shelf life of drug sample has expired, allowing the complaint to continue for prosecution of

petitioners in the facts of instant case, will be nothing but an abuse of process of law and, thus proceedings impugned deserves to be quashed and set aside.

Public Prosecutor supported the order impugned and submits that all these objections raised hereby can be agitated in course of trial and since complaint discloses commission of offence, summons have rightly been issued to the offenders and during trial they will get opportunity to satisfy the Court about act of commission of offences alleged against them; and as such no error has been committed while taking cognizance impugned and this petition deserves to be dismissed.

I have considered contention of Counsel for both the parties and with their assistance examined material on record. It is true that proceedings against accused at initial stage is ordinarily not to be interfere with but if on the face of complaint which lacks of material particulars for commission of offence under the Act, the Court should not be hesitant to invoke powers U/s 482, CrPC.

As regards legal proposition on two-fold grounds urged at the bar, it stands settled by

virtue of a number of decisions of Apex Court in **State of Haryana Vs. Brijlal Mittal (supra) Apex Court** observed:

> "It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in-charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfills both the above requirements so as to make him liable. Conversely, without being a director a person can be in-charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a baid statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in-charge of the company and also responsible to the company for the conduct of its business."

In **M/s Cadila Health Care Ltd Vs. State (supra**) this Court (DB) observed while examining scope of S.34 of the Act ad infra: -

> **"21.** The crucial test which has been laid down by the Hon'ble Supreme Court

> on the issue of Director being 'in charge of' & 'responsible to the company for the conduct of business of the company' as required under section 34 of the Act is that the Director is concerned with the day-to-day working of the company, or in other words, for over-all control of the day-to-day business of the company or firm which excludes Directors connected with policy of the company. The Director may not be in charge of business of the company or may be in charge of business of the company but not over all in charge or may be in charge of only some part of business and further test as regards averments/ allegations made in the complaint, the Supreme Court had laid down that words mentioned in the section are not the magic words but the substance of the allegations be read as a whole. ”

This Court has gone through entire complaint and finds that there is no averments in complaint which may disclose about petitioners being 'in-charge of' and 'responsible for the conduct of business of the Company' for day-to day or having over-all control over business whereof in order to make them vicariously liable for commission of offence or their act was in connivance with other accused or attributable to the neglect.

Para 10 having some relevance reads -

"10 - यह हैं कि निर्माता फर्म मै. बुरोज वेलकम इण्डिया लिमि., 91, एल. बी. एस. मार्ग मुलुण्ढड (पश्चिम) मुम्बई 400 080 का अभियोगी के नाम लिखा गया पत्र दिनांक 30-11-1998 को इसी कम्पनी के 10, करतारपुरा, 22 गोदाम जयपुर स्थित सी एण्ड एफ एजिन्ट मै. बगई फार्मा ने रजि पत्र दिनांक 09-12-1998 से भेजा जो अभियागी को 16-12-1998 को प्राप्त हुआ. जिसमें निर्माता ने राजकीय विश्लेषक की जांच रिपोट से असहमति व्यक्त करते हुए इसे चेलेज किया जिसकी सूचना पत्र क्रमांक 49 दिनांक 02-02-1999 के द्वारा औषधि नियंत्रक महोदय को रजिस्टर्ड डाक से भेजी गई एवं अग्रिम कार्यवाही हेतु मार्ग दर्शन चाहा"

It is settled that in criminal law, every role of vicarious liability should be spelled out in complaint, itself against persons sought to be made vicariously liable. There is no vicarious liability unless statute specifically provides for as in S.34 of the Act. Material disclosed in instant complaint does not create any such vicarious liability qua petitioners. Hence order of Magistrate taking cognizance of offence and issuing process for summoning petitioners is, therefore, without any basis.

That apart in instant case, sample of drug seized & sealed was sent to the Central Drugs Laboratory but in its letter dt.04/06/99 the Laboratory endorsed remarks -"No opinion could be given regarding standard of the sample

under Drugs & Cosmetics Acts & Rules as it was received on the last date of date of expiry (31/05/99) and could not be tested before the said expiry date", in absence of re-analysis, position of sample as analysed by State Public Analyst cannot be read as conclusive evidence of facts stated in the complaint – in view whereof, statutory right of accused provided in S.25(4) of the Act, has been infringed. Hence, in such circumstances to prosecute the petitioners in instant case is nothing but an abuse of process of law.

Consequently, misc. petition succeeds and is hereby allowed alongwith stay petition No.667/2000. Complaint and further proceedings as against petitioners initiated vide order dt. 28/05/99 and summoning them in Cr.Case No.102/99 vide order dt.15/07/99 of Chief Judl. Mag. Bundi are quashed and set aside. Record be sent back forthwith to the court below.

(**Ajay Rastogi), J.**